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Metropolitan Investment Co. v. Jerry Sine and Dora T. Sine : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

METROPOLITAN INVESTMENT COMPANY, a Partnership composed of W. ADRIAN WRIGHT, W. MEEKS WIRTHLIN, and A. P. NEILSON,
Plaintiff-Respondent,

vs.

JERRY SINE and DORA T. SINE, his wife,
Defendants-Appellants.

Case No. 9622

BRIEF OF RESPONDENT

Appealed from the District Court of Salt Lake County, Utah

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STATUTES CITED

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vs.

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Defendants-Appellants.

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The Plaintiff seeks to vitiate a restrictive covenant contained in a Quit-Claim Deed and Assignment of Contract.

DISPOSITION OF LOWER COURT

The case was tried to the Court. From a judgment by the District Court for Plaintiff, Defendants appeal.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment.

STATEMENT OF FACTS

Appellants' Statement of Facts is characterized by misinterpretation of the evidence and unwarranted inferences. We therefore deem it necessary to restate the facts.

THE FACTS

The property in question is a parcel 40 feet wide and 97 feet deep. The 40 feet constitute frontage on the North side of North Temple Street, approximately 141.5 feet West of the Northwest corner of the intersection of North Temple and 2nd West Street, Salt Lake City, Utah (Exhibits 1, 5, and 9).

Prior to September 22, 1960, this property was owned by one Steleanos E. Fendrelakis. Jerry Sine and Dora T. Sine, his wife, by Assignment of Contract, acquired an interest in the subject property as contract buyers on September 24, 1955 (Exhibit 7). This property contained an antiquated apartment house remodeled from an older home, containing approximately 8 units (R. 106 and 110).

On October 29, 1956, the subject property was sold to A. P. Nielson for $16,500.00 by the Appellants Jerry Sine and Dora T. Sine, his wife. This transaction consisted of a Quit-Claim Deed executed by the said

Jerry Sine and Dora T. Sine, his wife, in favor of A. P. Neilson and an assignment of the Fendrelakis contract (R. 106 and Exhibits 7 and 1). The Quit-Claim Deed and Assignment of Contract contained the following notation: "This property shall not be used for the erection of a motel thereon" (Exhibits 1 and 7).

On November 5, 1956, A. P. Neilson and Lillie M. Neilson, his wife, conveyed to W. Adrian Wright and Edna S. Wright, his wife, an undivided one-third interest, and W. Meeks Wirthlin and Betty Jo G. Wirthlin, his wife, an undivided one-third interest in the subject property (Exhibit 2 and R. 13).

On November 21, 1956, the property was again conveyed by A. P. Neilson and Lillie M. Neilson, his wife, W. Adrian Wright and Edna S. Wright, his wife, and W. Meeks Wirthlin and Betty Jo G. Wirthlin, his wife, to the Metropolitan Investment Company, a Co-Partnership consisting of W. Adrian Wright, W. Meeks Wirthlin, and A. P. Neilson (Exhibit 4, R. 13).

By Warranty Deed dated September 22, 1960, the fee owner of the subject property, Steleanos E. Fendrelakis, conveyed the subject property to the Metropolitan Investment Company (Exhibit 3, R. 13).

Jerry Sine and Dora T. Sine, his wife, are partners who have engaged in the motel business for approximately 14 years (R. 96). They operate two motels, one known as the Se Rancho Motor Lodge at 640 West

North Temple Street, Salt Lake City, Utah, approximately 3 blocks West of the property in question, and Scotty's Romney Motel located on North Temple Street, between 6th and 7th West, Salt Lake City, Utah, approximately 4 blocks west of the subject property (R. 63 and 67). Said properties also being separated from the subject property by the Salt Lake viaduct and railroad tracks (R. 33 and 54).

At the time of the purchase of the subject property, A. P. Neilson did not contemplate the construction of a motel thereon (R. 22), nor did the partnership, Metropolitan Investment Company, which later acquired title (R. 47).

Mr. Sine testified that the purchase of this property from Mr. Fendrelakis was for the purpose of preventing a motel from being constructed upon the property between 2nd and 3rd West Streets, Salt Lake City, Utah (R. 53, 54, 55, 56, 57, 68, and 70). He further testified that the property was not large enough to be of any real value as a motel site (R. 52), and that the most it would accommodate as a motel would be 3 or 4 or 5 units (R. 69), and that, in fact, the construction of 6 motel units upon the property would not materially affect his motel business or other property holdings (R. 96).

Western Travel, Inc., a corporation engaged in the motel business, which acquired the subject property by Agreement dated September 30, 1960, (Exhibit 10), plans to construct upon its own properties sur-

rounding the subject property, a motel development of approximately 130 units, together with restaurant and swimming pool, and if the subject property can be utilized as part of this development, the number of units would be increased by approximately 6 (R. 73, 74, and 75). Said corporation intends to construct a motel upon the properties surrounding the subject property regardless of the outcome of the lawsuit. The subject property is of such a nature as to prevent the optimum use of the adjoining properties owned by Western Travel, Inc., and constitutes a peninsula 40 feet by 97 feet into the properties of Western Travel, Inc., that is to be utilized as a motel (R. 82, 84, and 85).

In 1956, the structures located upon the subject property were old, dilapidated, and in a tenement type of neighborhood and were in dire need of repair and difficult to keep rented (R. 34, 109, 110). Also, in October, 1956, the property was zoned B-3, which is limited commercial property suitable for motel and general commercial business (R. 36), and within a radius of 2 blocks of the subject property there existed 4 motels as follows: Ruth Motel: 12 units; Western Motel: 29 units; Covered Wagon Motel: 32 units; and Temple Motel: 18 units, for a total of 91 motel units. The balance of the neighborhood consisted of relatively old homes converted into apartments and commercial establishments (R. 27 and 28).

From October, 1956, to date of trial, December 1, 1956, there had been constructed within the same area

described above the following: Harman Cafe; Utah Motor Lodge: 156 units; City Center Motel: 26 units; Travel Lodge Motel: 55 units; Travel Lodge: 52 units; and Townhouse Motel: 48 units, an increase of 337 motel units or 470% (R. 29, 30, 31). Also, there has been other new construction in the vicinity of the subject, property including service stations, parking lots, and the removal of old, antiquated buildings (R. 31 and 32).

Western Travel, Inc., purchased the properties of Metropolitan Investment Company surrounding and including the subject property, for the sum of $200,000.00, for which they agreed to pay cash and 105,000 shares of the capital stock of said corporation, of a par value of $1.00 per share, to the partners, A. P. Neilson, W. Adrian Wright, and W. Meeks Wirthlin, 35,000 shares to each of said parties, (R. 37, 38, 83, and Exhibit 10) the amount of stock received by the partners, A. P. Neilson, W. Adrian Wright, and W. Meeks Wirthlin being less than 12% of the outstanding stock of said Western Travel, Inc., and none of said partners being officers or directors of said corporation (R. 83 and 84).

POINTS URGED FOR AFFIRMANCE

POINT I

THE EVIDENCE OF RECORD DOES SUPPORT THE DISTRICT COURT'S FINDING

(NO. 18) THAT SINCE OCTOBER, 1956, THERE HAS BEEN A GREAT AND SUBSTANTIAL CHANGE IN THE NEIGHBORHOOD AND AREA SURROUNDING THE SUBJECT PROPERTY.

POINT II

THE FINDINGS OF THE DISTRICT COURT (NO. 14, NO. 22) THAT THE SAID RESTRICTION WAS LIMITED TO CONSTRUCTION BY A. P. NEILSON PERSONALLY IS SUPPORTED BY THE EVIDENCE, HOWEVER, SUCH A FINDING WAS NOT NECESSARY TO THE CONCLUSION REACHED BY THE COURT AND THAT THE JUDGMENT IS AMPLY SUPPORTED BY OTHER EVIDENCE THAT MAKES THE RESTRICTION VOIDABLE.

POINT III

THE DISTRICT COURT'S DECISION THAT MR. AND MRS. SINE, THE APPELLANTS HEREIN, AND ALL WHO MAY CLAIM UNDER THEM, HAVE NO RIGHT WHATSOEVER IN THE PROPERTY IS FULLY SUPPORTED BY THE FACTS AND THE LAW APPLICABLE THERETO.

ARGUMENT

POINT I

THE EVIDENCE OF RECORD DOES SUPPORT THE DISTRICT COURT'S FINDING (NO. 18) THAT SINCE OCTOBER, 1956, THERE HAS BEEN A GREAT AND SUBSTANTIAL CHANGE IN THE NEIGHBORHOOD AND AREA SURROUNDING THE SUBJECT PROPERTY.

The witness, W. Meeks Wirthlin, testified that he has been a real estate salesman since 1946 and a real estate broker since 1948, and further testified that he has been engaged in the purchase and sale of property and various business investment transactions in the State of Utah since 1946 (R. 23 and 24). He further testified that he was familiar with the area within a radius of two blocks of North Temple and 2nd West Street, Salt Lake City, Utah, and testified in respect to the change of circumstances that have taken place in that area since October, 1956. His is the only testimony on the subject and from Mr. Wirthlin, facts were elicited concerning the motels that have been constructed since October, 1956, and the change in the character of the neighborhood.

Since October, 1956, there have been constructed 5 motels totaling 337 rental units within a two block radius of the subject property purchased from Jerry Sine and Dora T. Sine, his wife, and in addition thereto,

there has been the construction of the Harman Cafe and two service stations. Older buildings have been eradicated and at least one parking lot established (R. 25-34 and Exhibit 5).

Mr. Wirthlin testified that in his opinion, there has been a substantial change in the character of the neighborhood surrounding the subject property (R. 33 and 34). He further testified that the property in question would not have great utility or commercial value except in conjunction with other properties surrounding it, this being because of the size of the parcel of land, building restrictions imposed by City Ordinance, and parking restrictions (R. 36 and 37).

There being no substantial dispute of Mr. Wirthlin's testimony as to the character of the neighborhood nor as to his qualifications as an expert giving such testimony, it could be assumed that the trial court believed the testimony offered by the Respondent. However, even assuming that a conflict of facts existed concerning this issue, the Court is nevertheless the trier of this fact and its finding, when based upon substantial evidence such as that offered by the Respondent, will not be reviewed. In support of this we cite: Gappavar v. Scheuman, 1957, 51 Wash., 2d 55, 350 P.2d 649:

> "A finding of the trial court in respect to facts proved will not be reviewed by the Supreme Court on a legal question. In any event, the Supreme Court will not substitute itself for the trier of fact to determine factual matters."

In O'Gara v. Findlay, 6 U.2d 102, 306 Pac. 2d 1073, the Supreme Court of the State of Utah said:

> "The main contention upon appeal is that there was no valid delivery of the deed in question. In reviewing this contention, we will keep in mind the fact that the trial court found a valid delivery. Since this is true, we will not overturn its decision unless it is manifest that the trial court misapplied proven facts or made findings clearly against the weight of the evidence."
>
> " * * * We are not inclined to overturn the findings of the trial court when supported by the uncontradicted testimony of all the witnesses, which is unrefuted by the documentary evidence involved, nor are we aware of any rule of law that would permit us to do so."

In Wolff v. Fallon (Cal. Dist. Ct. of Appeal) 269 Pac. 2d 630, the Court said:

> "It is well established that the right to relief from restrictive covenants such as those herein, depends upon the facts of each case. The findings of the trial court in such a case are entitled to the same weight as in any other case, and if based on any substantial evidence, they are final." Strong v. Hancock, 201 Cas. 530; 258 P. 60; Robertson v. Nichols, 92 Cal. App. 2d 201, 207; 206 P.2d 898.

In Key v. McCabe, 356 P.2d 169, the Supreme Court of the State of California said:

> "The trial court concluded that the building restrictions were unenforceable against Defendants' lot."

"This is the sole question presented for determination: *Is there substantial evidence in the record to support the findings of fact set forth above?*"

"*Yes.* The rule is established that when a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of the appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. (Primm v. Primm, 45 Cal. 2d 690, 293 (1), 299 P.2d 231.)"

POINT II

THE FINDINGS OF THE DISTRICT COURT (NO. 14, NO. 22) THAT THE SAID RESTRICTION WAS LIMITED TO CONSTRUCTION BY A. P. NEILSON PERSONALLY IS SUPPORTED BY THE EVIDENCE, HOWEVER, SUCH A FINDING WAS NOT NECESSARY TO THE CONCLUSION REACHED BY THE COURT AND THAT THE JUDGMENT IS AMPLY SUPPORTED BY OTHER EVIDENCE THAT MAKES THE RESTRICTION VOIDABLE.

The language contained in the Quit-Claim Deed and Assignment of Contract (Exhibits 1 and 7), is subject to more than one interpretation. It could be considered as a covenant which runs with the land or could be considered as a personal covenant applying

only to the Grantee and Assignee named therein. The nature of the covenant can only be determined from the intent of the parties at the time of its imposition. Mr. A. P. Neilson testified that he himself did not intend or desire to build a motel upon the subject premises and from such testimony, the Court could clearly conclude that the Grantee accepted the Deed and Assignment with the full knowledge and understanding that the restriction was to apply to him only and not be binding upon his heirs, successors, or assigns (R. 22).

The covenant herein involved is somewhat akin to the covenant contained in the case of Parrish v. Richards, 8 Utah 2d 419; 336 P.2d 122. In this case the Court said:

> " * * * We will not overturn its decesion unless it is manifest that the trial court has misapplied proven facts or made findings clearly against the weight of the evidence.
>
> "The trial court followed the correct doctrine that in the construction of an uncertain or ambiguous restrictions, the courts will resolve all doubts in favor of the free and unrestricted use of property, and that it will 'have recourse to every aid, rule, or canon of construction to ascertain the intention of the parties.' "

In 26 C.J.S. 1094, Section 162 (3) it is stated:

> "In construing restrictions on the use of property, the intention of the parties, as gathered from the surrounding circumstances and the purpose of the restriction, must be considered

> and given effect. Such restrictions are strictly construed against the parties seeking to enforce them and should not be extended by construction or implication beyond the clear meaning of their terms; and all doubts are resolved in favor of the free use of property."

(See also 14 Am. Jur. 621, Section 212; 26 C.J.S. 1138, 167).

In the instant case, the intention of the parties is not made clear upon the face of the instrument. It is ambiguous and uncertain and no time for its duration is specified nor is the same specifically made binding upon the heirs, successors, or assigns of the Grantee. Furthermore, the testimony of Mr. Sine would suggest and indicate that he was more concerned about A. P. Neilson as a "motel man" than any other factor (R. 51-52). Such being the circumstance, based upon the testimony of the various witnesses, the Court could reasonably conclude that it was the intention of the parties that the covenant imposed was of a personal nature only and would expire upon the transfer and conveyance of the interest of Mr. Neilson to a subsequent Grantee or Assignee. (See the recent case of Smith, et al, v. Second Church of Christ, 87 Ariz. 400; 351 P.2d 1104 at Pages 1110-1111).

Regardless of the conclusion reached by the Court with respect to this covenant being personal or one that runs with the land, there does not exist sufficient basis to reverse the trial court's judgment, as the covenant fails for reasons that will be argued under Point III,

and therefore the finding of the court in this regard is not conclusive of the final determination.

POINT III

THE DISTRICT COURT'S DECISION THAT MR. AND MRS. SINE, THE APPELLANTS HEREIN, AND ALL WHO MAY CLAIM UNDER THEM, HAVE NO RIGHT WHATSOEVER IN THE PROPERTY IS FULLY SUPPORTED BY THE FACTS AND THE LAW APPLICABLE THERETO.

The Appellants, in their Brief, have seen fit to subdivide the discussion of Point III into several subtopics. This Brief will answer each sub-topic through a general discussion rather than make a separate discussion of each sub-topic.

In each case cited by the Appellants in support of this Point, there appears to be a benefit running to the exactor of the covenant. In the case before this Court, the Appellants imposed the restriction in the Assignment of Real Estate Contract and the Quit-Claim Deed, and such restriction constitutes a detriment upon the land of the Respondent but confers no benefit whatever on the land of the Appellants (R. 69-96). In fact, on Page 96 of the Record, Mr. Sine, one of the Appellants, was asked concerning the effect of the construction of 6 motel units as proposed by Western Travel, Inc., on the tract of land in question:

"Q. Would it materially damage or affect your other property interests?

"A. I don't think the six units would, no."

The trial court found that there was no benefit running to the Appellants and only a detriment to the land of the Respondent (Finding of Fact 13, Finding of Fact 25). It is interesting to observe that the Appellants have not taken an appeal from these Findings of Fact. Since there has been no appeal taken from these Findings, the same must be considered as admitted and certainly there is no reason for continuing the restriction unless there is a benefit to be realized by the Appellants.

A discussion of the law on the subject is found in 14 Am. Jur. 649, Section 305, wherein it is stated:

> "The test for determining whether restrictions imposed by deed on the use of property conveyed should be declared by a court of equity to be extinguished as a cloud on title has been said to be whether the original purpose and intention of the parties can be reasonably carried out in the light of the materially changed conditions."

The Supreme Court of California in Hurd v. Albert, 3 Pac. 2d 545; 76 A.L.R. 1348, which appears to be a leading case on the subject, said on Page 1354 A.L.R.:

> "We are of the opinion, after reading the record, that the above findings are all supported by substantial evidence, and cannot be disturbed on appeal. Such findings are ample to sustain a

judgment denying injunctive relief. Whatever may be the weight of authority in other jurisdictions, the rule in this jurisdiction is well settled and the equity courts will not enforce restrictive covenants by injunction in a case where, by reason of a change in the character of the surrounding neighborhood, not resulting from a breach of the covenants, it would be oppressive and inequitable to give the restriction effect, as where the enforcement of the covenant would have no other result than to harass or injure the defendants, without benefiting the plaintiff."

"And so though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the Defendant so onerous that its enforcement would impose great hardship upon him, and cause little or no benefit to the Plaintiff."

See also Wolff v. Fallon (Supreme Court of California) 284 P.2d 802; and see also Whitmarch v. Richmond, 20 A.2d 161; 179 Md. 523, which interprets substantial benefit. And, Barton v. Moline Properties, 121 Fla. 683; 164 Southern 551; 103 A.L.R. 725, which establishes the doctrine of substantial benefit to the dominant lot as a test for maintaining the restrictive covenant.

A covenant will not be enforced if there has been a substantial change in the character and circumstances of the neighborhood. In the case before this Court, the trial court found that there was a change in the character and circumstances in the neighborhood, as discussed

previously under Point I. We contend that the Finding of Fact is a factual matter which cannot be disputed on appeal. See: 14 Am. Jur. 646, Section 302:

> "A change in the character of the neighborhood which was intended to be created by restrictions has generally been held to prevent their enforcement in equity, where it is no longer possible to accomplish the purpose intended by such covenant, * * * . In fact, equity may remove restrictions as a cloud on title in such a case."

See also 14 Am. Jur. 668, Section 344; Restatement of Property, Section 539, Comment (f); 26 C.J.S. 1175, Section 171. Cases on this subject are: Price v. Anderson, 358 Pa. 209; 56 A.2d 215; 2 A.L.R. 2d 593; Sanders v. McAmmon (Oklahoma) 365 P.2d 730; Woods v. Knox (Oklahoma) 277 P.2d 982; Wiltoff v. Kohl (New Jersey) 147 Atl. 930; 66 A.L.R. 1317. See also Annotations 54 A.L.R. 812; 88 A.L.R. 405; 103 A.L.R. 734, and 4 A.L.R. 2d 1111.

In the case of Price v. Anderson, cited hereinabove, the Court there stated, in part, as follows:

> "It is an elementary principal of equity jurisprudence that such a decided change of conditions makes it improper for a Chancellor to enforce a covenant which limits the full right of an owner to develop his property; this is because public policy dictates that land shall not be unnecessarily burdened with permanent or long continued restrictions and because equity will not retard improvements simply in order to sustain the literal or technical observance of a covenant which for one reason or another has

become useless from the standpoint of any practical utility." (Cases there cited).

> "Seizing upon the words 'substantial value', Plaintiffs claim that, regardless of whatever changes have occurred, the restrictive covenant remains of real value to them because it enables them to retain the control of commercial uses as an asset enhancing the rental and sale value of their presently unsold property and true it is that, if they can have the sole and unrestricted right to erect and lease store properties on the tracts retained by them and can prevent Defendant from erecting stores which would compete with those now erected and that may hereafter be erected on their own retained land, such a monopoly might well constitute a valuable right. But that is not the kind of value to which the applicable principal of equity relates. The value referred to in the authorities is the benefit to the owner of the dominent tenemant in the 'physical use or enjoyment of land possessed by him.' "

A covenant is only enforceable for a reasonable period of time where no time is specified in the restriction, which is the situation here. See 14 Am. Jur. 484, Section 5. In this citation it is said:

> "The duration of restrictive covenants, if not specifically limited by the conveyances, is for a reasonable time, considering the nature of circumstances of and the purpose of their imposition."

Covenants will not be enforced after there has been a change in the locality or neighborhood as to render the restriction of little substantial value to the dominant

lots. Here the neighborhood has changed in character, a question of fact, and therefore, the covenant has expired through the lapse of a reasonable time. See McClintock on Equity, Page 221, Section 123; 95 A.L.R. 458; Powell on Real Property, Vol. 5, Page 216, Section 684; and Norris v. Williams, 54 A.2d 331; 4 A.L.R. 2d 1106.

A court of equity should not enforce the restriction imposed upon the tract of land in question for the reason that the enforcement of that restriction would not effectuate the purpose for which it was imposed. The Appellant, Mr. Sine, testified that the purpose of the restriction was to prevent the construction of a large motel between 2nd and 3rd West on North Temple Street (R. 68). He further testified that the property itself was not large enough to be of real value as a motel site but purchased same to keep a large motel from being developed (R. 53, 54), and later stated that the restriction was imposed to prevent someone else from developing a motel (R. 70). Mr. Sine testified that he imposed the restriction on this small parcel of land, intending that this piece of property was the *"key"* to a motel site and would prevent a large motel from being constructed between 2nd and 3rd West on North Temple Street. Western Travel, Inc., plans to construct a large motel containing between 124 to 140 units between 2nd and 3rd West on North Temple Street whether the restriction on this small parcel is held invalid or not (R. 83, 84). Since a large motel will be constructed on the property surrounding the subject

property, the purpose of the restriction cannot be realized regardless of the outcome of this lawsuit. A court of equity will not enforce the bare right of the Appellants when it will provide no benefit to them and only impose a detriment on the use of the property by Respondent.

Dean Pound in his discussion on covenants in 33 Harvard Law Review, beginning at Page 171, said:

> "When the purpose of the restriction can no longer be carried out, the servitude comes to an end."

The Supreme Court of Florida in Osius v. Barton, 147 So. 862, 88 A.L.R. 395, said:

> " * * * that the general policy of the law to dispense with encumbrances on title shall prevail, where enforcement of restrictive covenants is no longer of general usefulness, nor capable of serving the purposes for which the restrictions were imposed. Clark on Covenants and Interests Running with Land, supra, 163-165; Jackson v. Stevenson, 156 Mass. 496, 31 N.E. 691, 32 Am. St. Rep. 476."

See also Hurd v. Albert, supra, and Price v. Anderson, supra.

The trial court found that the Appellants imposed a restriction for the purpose of controlling and oppressing the development of the block within which the property is located and to prevent competition with their business located some 3 blocks West of the subject property (R. 121). The Appellant, Mr. Sine, freely

admitted that this was his purpose in imposing the restriction (R. 68-70). An agreement not to engage in a business in competition with the Seller will only be enforced if the restriction is reasonable and not against public policy (36 Am. Jur. 530-531). The Appellants did not intend to prohibit the construction of a motel on this piece of property having only a frontage of 40 feet on North Temple Street, because the tract was too small to support a motel development. Rather, their purpose was to prevent a motel from being constructed on the property having a frontage of approximately 288 feet on North Temple Street between 2nd and 3rd West Street, and a bold attempt by the Appellants to stifle and retard the development of a large piece of property on a street that is rapidly becoming a "motel row" in Salt Lake City, Utah, by the use of this restriction on the small piece of property which they considered to be the key to a large motel development. Certainly such a restriction is unreasonable under any construction or interpretation. To attempt to restrict the development of this large block of property is against public policy and should not be allowed under any circumstances. See Price v. Anderson, supra, and Hurd v. Albert, supra.

SUMMARY AND CONCLUSION

The Appellants acquired this small tract of land in question for one principal purpose, i.e., to stymie or prevent the growth and development of the entire

block within which the subject property is located, in so far as the same could possibly be utilized for any motel operation or similar endeavor. Appellants admit that in so far as the utilization of the subject property for a motel is concerned, there will be no material detriment to their operations and properties located some 3 to 4 blocks West thereof and separated by the wide expanse of railroad tracks and viaduct. We therefore fail to comprehend any valid reason for the retention of the restriction. We are of the opinion that a court of equity should lend its assistance to permit and make possible the normal progressive development of the commercial district within which the subject property is located and should not hesitate to strike down the restriction herein involved. Certainly in any event, the restriction, if initially valid, has now elapsed and expired by reason of the lapse of reasonable time from the date of its imposition due to the change and development in the neighborhood and the fact that it bestows no benefit to Appellants. We respectfully submit that there exists an abundance of competent evidence, testimony, and law to sustain the Findings of Fact and Conclusions of Law for the affirmance of the Decree rendered by the trial court.

Respectfully submitted,

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